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No. 427

IN THE

Supreme Court of the United States

SHERMAN H. SKOLNICK,

Petitioner,

vs.

CHARLES T. MARTIN, ARTHUR LILLY and CHARLES R. PERRIGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Sherman H. Skolnick, prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the Seventh Circuit. Petitioner's timely Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit was denied on June 6, 1963.

OPINION BELOW

The opinion of the Court of Appeals is reported in full in 317 F. 2d 855. It is printed herein as Appendix A.

Documents and Papers Transmitted with Petition

Certified copies of the following filed in the United States Court of Appeals, Seventh Circuit, with nine (9) additional copies:

1. Petitioner's Brief and Appendix.
2. Respondent Martin's Brief.
3. Brief of Respondents Lilly and Perrigo.
4. Petitioner's Reply Brief.
5. Petitioner's Petition for Rehearing with Attached Motion to Expunge Portions of the Court's Opinion.
6. Certified copy of the Opinion rendered by the United States Court of Appeals for the Seventh Circuit.
7. Certified copy of the judgment of Court of Appeals, entered on May 7, 1963.
8. Certified copy of the Order entered June 6, 1963, denying Petition for Rehearing.

JURISDICTION.

The final judgment of the United Court of Appeals for the Seventh Circuit, affirming the dismissal by the District Court, was entered on May 7, 1963. (Appendix B, infra, page 35). The petitioner filed a timely petition for rehearing, which was denied on June 6, 1963 (Appendix C, infra, page 36).

The petitioner therefore invokes the jurisdiction of this Court under 28 U.S.C.A. Section 1254(1).

In addition, the petitioner invokes this Court's power of supervision over the lower courts because the Court of Appeals for the Seventh Circuit, in petitioner's suit, has so far departed from the accepted and usual course of judicial proceedings.

1. The Court of Appeals has assumed, in petitioner's suit, the functions of a trial court, passing upon the merits of petitioner's suit at the same time affirming a dismissal for lack of jurisdiction—an act of a Court of Appeals contrary to precedent (See *Stephenson* v. *Equitable Life Assur. Soc.*, 4 Cir.; 92 F.2d 406, 410). The petitioner was not heard on the merits of his suit in the District Court.

2. The Court of Appeals has affirmed a void judgment. Although the petitioner was assailed in his rights in the District Court he was not permitted to be heard there on the merits of his claim.

3. The Opinion of the Court of Appeals relies upon, and adopts and recites, unfounded and unproven allegations from outside the record, thus defaming and disparaging the petitioner and denying the petitioner due and orderly process in the Court of Appeals, a Federal right guaranteed by the Fifth Amendment to the Constitution. By adopting and reciting the unfounded and unproven allegations from outside the record, the Court of Appeals has enabled the respondents to perpetrate a fraud upon the Court of Appeals. (See Certified copy of Petition for Rehearing, with attached Motion to Expunge Portions of the Court's Opinion, pp. 1-5, pp. 8-9, p. 13).

4. The Opinion of the Court of Appeals relies upon, and adopts and recites, supposed facts directly opposite to the record, thus depriving the petitioner of due and orderly process in the Court of Appeals, a Federal right guaranteed by the Fifth Amendment to the Constitution. By adopting and reciting supposed facts directly opposite to the record, the Court of Appeals unjustly defames and disparages the petitioner. (See Certified copy of Petition for Rehearing, with attached Motion to Expunge Portions of the Court's Opinion, pp. 1-5, p. 13). The

Court of Appeals ignored petitioner's Motion to Expunge Portions of the Court's Opinion.

5. The Court of Appeals sanctions a departure by the District Court from the accepted and usual course of judicial proceedings.

The petitioner invoked the jurisdiction of the District Court under the provisions of Title 28 U.S.C. Sections 1331 and 1343; Title 42 U.S.C. Sections 1983, 1985(2), 1985(3), 1988; Title 18 U.S.C. Section 241; and under the Constitution of the United States and particularly Amendment XIV, Section 1.

QUESTIONS PRESENTED.

1. Whether the district court has jurisdiction of a suit seeking to recover damages from a State Court Deposition Examiner and collaborators for torturing and injuring a witness, a paraplegic cripple, under the guise and pretext of a Discovery Deposition; the misuse of power they possessed by virtue of a State Court Order and made possible only because they were clothed with the authority of the State compulsory deposition power.

2. Whether compulsion to testify at a State civil court deposition by fear of hurt, torture, or exhaustion, violates the Fourteenth Amendment guarantees of Due Process and the Equal Protection of the Laws.

3. Whether a State Court Deposition Examiner and collaborators who torture and injure a witness, a paraplegic cripple, under the guise and pretext of a Discovery Deposition, proceed "under color of" law and are subject to the sanctions of 42 U.S.C.A. Section 1983.

4. Whether a State Court Deposition Examiner and collaborators who torture and injure a citizen who is a witness and state court litigant in furtherance of a con-

spiracy for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in Illinois, with intent to deny to that citizen the equal protection of the laws are subject to the sanctions of 42 U.S.C.A. Section 1985(2).

5. Whether a State Court Deposition Examiner and collaborators that injure a paraplegic cripple, who is a witness and state court litigant, for lawfully enforcing, or attempting to enforce, in the State courts, his right to the equal protection of the laws, are subject to the sanctions of 42 U.S.C.A. Section 1985(2).

6. Whether a State Court Deposition Examiner, who was on other occasions an attorney, together with his collaborators, that injure a person who is a witness and state court litigant in furtherance of a conspiracy to obstruct, hinder, and affect the fairness of the State compulsory deposition instrumentality, and the State courts, from giving or securing to that person the equal protection of the laws, are subject to the sanctions of 42 U.S.C.A. Section 1985(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

A.) Amendment XIV to the Constitution of the United States, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B.) Title 42, U.S. Code Annotated, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

C.) Title 42, U.S. Code Annotated, Section 1985(2):

"* * * if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State * * *, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person * * * to the equal protection of the laws;"

D.) Title 42, U.S. Code Annotated, Section 1985(3):

"If two or more persons in any State * * * conspire * * * for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE.

The petitioner, a paraplegic cripple from polio in 1936 at the age of 6, seeks to hold a State Court Deposition Examiner and collaborators, respondents here, liable for misuse of the power respondents possessed by virtue of a State Court Order and made possible only because the respondents were clothed with the authority of the State compulsory deposition power. The respondents, armed with the State Court Order and clothed with the state compulsory deposition power, under the guise and pretext of a Discovery Deposition, put the petitioner, a witness, through a barbaric ordeal of torment, torture, intimidation, and injury.

On January 7, 1960, the respondents procured an Order of the State Court, Circuit Court of Cook County, Illinois, for petitioner's Discovery Deposition on oral interrogatories, to be taken the same day, at 2:00 o'clock p.m., in the office enclosure of the State Court Deposition Examiner, respondent Martin, who was on other occasions an attorney.

Petitioner's request for a protective Order for his safety, with the minimum requirement of giving his deposition in a neutral place, was resisted by the State Court Deposition Examiner, who was on other occasions an attorney, and his collaborators, respondents, and was refused by the State Court. (App. 4, par. 8; Rec. 5).

The petitioner, a polio victim singe 1936 at the age of 6, and a paraplegic cripple with a scoliosis spinal condition, had 16 major operations up to 1945. Within his chest frame and cage the petitioner has a series of artificial muscles made up of thigh facia, seriously restricting petitioner's sitting continuously for more than 45 minutes.

Since 1937 until the events of January 7, 1960, petitioner was ambulatory on braces and crutches, suffering from flaccid paralysis of both lower extremities, and paralysis of the anterior abdominal muscles, and scoliosis of the dorsal and lumbar spines, all from polio. (App. 3-4, par. 5; Rec. 4,5). Petitioner's condition, debility, and incapacity were visible and known to the respondents. (App. 4, par. 7; Rec. 5).

The respondents, armed with the State Court Order and clothed with the state compulsory deposition power, contrived and combined, under the guise and pretext of Discovery Deposition, to intentionally subject the petitioner to a barbaric ordeal of torment, torture, intimidation, and injury by committing the following overt acts:

1. Directed and forced the petitioner to sit from 2 p.m. to 6:20 p.m. in a low back, narrow chair with no arm rests of an adequate height for a paraplegic cripple with scoliosis spine, disregarding and ignoring petitioner's protests. (App. 5, par. 11(a); Rec. 6-7).

2. Took and kept away from petitioner his crutches, which he needed for support and protection. (App. 5, par. 11(b); Rec. 7).

3. Directed and forced petitioner's father to sit at a distance, away from the petitioner, preventing the needed attention from his father to lift petitioner's legs, rearrange his position and move and re-position the petitioner as his father does when petitioner sits down. (App. 5, par. 11(c); Rec. 7).

4. Over the protestations of petitioner, the respondent, Martin, was standing over the petitioner and screaming down at him. (App. 5, par. 11(d); Rec. 7).

5. Over the protestations of petitioner, the respondent, Martin, was hovering over the petitioner, wrenched an en-

velope from him, removed the contents, and flung the envelope back at the petitioner. (App. 6, par. 11(e); Rec. 7).

6. Kept the petitioner sitting for four hours and twenty minutes in such low back, narrow chair with no arm rests of an adequate height for a paraplegic cripple with scoliosis spine, thereby causing the petitioner to suffer great pressure because of no back or arm support, which caused a "caved-in" back effect on scoliosis spine of the petitioner, severe hanging leg pressures; great impinging pressure at hip bone sockets because of lack of back and arm support on account of petitioner's leg braces extending up to the hips; thigh pains; pulling down of weight of the braces with the hip end of braces pushing up; and caused fulcrum pressures like on see-saw, all of which were known or made known to the respondents. (App. 6, par. 11(f); Rec. 7).

7. During the taking of petitioner's discovery deposition, the respondents operated a secret recording device concealed in another room under their manipulation, without informing petitioner or his attorney, either before or during the deposition, and without stating their design or purpose. Such secret recording was carried on while respondents' own court-reporter was taking down petitioner's deposition stenographically. (App. 6, par. 11(g); Rec. 7-8).

After the above described barbaric ordeal, the petitioner collapsed, becoming delirious and was transported to his home suffering constant pain in his back. He was forced to stay in bed for a period of two weeks, and ever since, the petitioner cannot ambulate with his crutches as theretofore, necessitating the use of a wheel chair. As a consequence of such barbaric ordeal the petitioner has also suffered attacks of dyspnea (difficult respiration) and has become completely paralyzed. (App. 6-7, par. 13; Rec. 8).

The petitioner brought suit against the State Court Deposition Examiner and collaborators, respondents. The Complaint was filed Jan. 4, 1962, with Demand for Jury Trial. The allegations in petitioner's Complaint (App. 3-7; Rec. 4-9) were admitted by respondents' motions to dismiss (App. 10-12; Rec. 23-25. App. 12-14; Rec. 26-28). No responsive pleading was filed to the Complaint. The petitioner, although assailed in the District Court, was not heard there on the merits of his claim.

The Court of Appeals, ignoring the foundation of the judgment of the District Court, proceeded nonetheless to affirm the dismissal. The Court of Appeals indicates in its Opinion that the District Court lacked jurisdiction and that the respondents were not under color of law. In affirming the dismissal for lack of jurisdiction, the Court of Appeals proceeded, without lawful authority, to pass upon the merits of the petitioner's case.

The written Opinion of the Court of Appeals relies upon, and adopts and recites, unfounded and unproven allegations from outside the record, thus defaming and disparaging the petitioner, and denying the petitioner due and orderly process in the Court of Appeals. The Court of Appeals, by relying upon the unfounded and unproven allegations from outside the record, has enabled the respondents to perpetrate a fraud upon the Court of Appeals. (See Petition for Rehearing, with attached Motion to Expunge Portions of the Court's Opinion, pp. 1-5, 8, 13).

The Court of Appeals relies upon, and adopts and recites, supposed facts, *directly opposite* to the record, depriving the petitioner of due and orderly process in the Court of Appeals. (See, Petition for Rehearing, with attached Motion to Expunge Portions of the Court's Opinion, page 2, par. "C", subpar. 2; page 5).

The timely Petition for Rehearing was denied June 6, 1963. The Court of Appeals ignored the petitioner's Motion to Expunge.

REASONS FOR GRANTING THE WRIT.

I.

This Court in *Monroe v. Pape* said:

> "There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, 25 L. Ed. 676, that Congress has the power to enforce the provisions of the Fourteenth Amendment against those who carry a *badge of authority* of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." 365 U.S. 167, 171-172, 81 S. Ct. 473, 476, 5 L. Ed. 2d 492 (Feb., 1961). (Emphasis added).

Too often the words "badge of authority" are taken quite literally and the Courts of Appeals, in cases coming after *Monroe v. Pape*, give effect to the provisions of 42 U.S.C.A. Sec. 1983, regarding "under color of" law, where there is to be found the uniform, the revolver, and the nickel-plated star—the popular notion of state power and authority.

For example:

Hughes v. Noble, 5 Cir., 295 F. 2d 495 (Nov., 1961).
Hardwick v. Hurley, 7 Cir., 289 F. 2d 529 (May, 1961).
Cohen v. Norris, 9 Cir., 300 F. 2d 24 (Jan., 1962).
Stringer v. Dilger, 10 Cir., 313 F. 2d 536 (Jan., 1963).

The petitioner, a paraplegic cripple from polio since 1936 at the age of 6, seeks to hold a State Court Deposition Examiner and collaborators, respondents here, liable for misuse of power respondents possessed by virtue of a State Court Order and made possible *only* because the

respondents were clothed with the authority of the State compulsory deposition power. The respondents, armed with the State Court Order and clothed with the state compulsory deposition power, under the guise and pretext of a Discovery Deposition, put the petitioner, a witness, through a barbaric ordeal of torment, torture, intimidation, and injury. This the Court of Appeals says was not done "under color of" law. In affirming the dismissal, the Court of Appeals indicated that the District Court lacked jurisdiction and that the respondents were private parties. (Appendix A, *infra*, pages 32-33).

In petitioner's case, the Court of Appeals said:

> "This is a far cry from *Monroe* v. *Pape*, *supra*, where defendants were city policemen charged with brutality in arresting the plaintiff. The wrongs alleged there were committed by officers of the law acting under color of state law. They misused the power conferred upon them." (Appendix A, *infra*, page 33).

Apparently, it would seem that since the respondents were not in uniform, and were without revolvers and nickel-plated stars, they were not acting "under color of" law.

Yet, in *Home Telephone & Telegraph Co.* v. *Los Angeles*, this Court said:

> "... the provisions of the (Fourteenth) Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the states, but also to *every person*, whether natural or juridical, *who is the repository of state power*. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a state of power, *in whatever form exerted*." 227 U.S. 278, 287, 33 S. Ct. 312, 314, 57 L. Ed. 510. (Emphasis added).

It should, therefore, be clear that "under color of" law and "badge of authority" do not automatically mean a uniform, revolver, etc. The language of the *Home Telephone & Telegraph* case is clear—"every person, whether natural or juridical, who is the repository of state power." 227 U.S. 278, 287.

The petitioner's position that the respondents are subject to the sanctions of Section 1983 is clearly within this Court's decision in *United States* v. *Classic*:

> "Misuse of power, possessed by virtue of state law and made possible *only* because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368. (Emphasis added).

The meaning of the words "under color of" state law was reaffirmed in *Screws* v. *United States*, 325 U.S. 91, 108-113, 65 S. Ct. 1031, 1038-1041, 89 L. Ed. 1495. And that view was adhered to in *Williams* v. *United States*, 341 U.S. 97, 99, 71 S. Ct. 576, 578, 95 L. Ed. 774. And that view was reaffirmed in *Monroe* v. *Pape*, 365 U.S. 167, at pages 183-185, 81 S. Ct. 473, at pages 482-483.

The petitioner's position is that the respondents were "the repository of state power." (*Home Tel. & Teleg.* v. *Los Angeles*, 227 U.S. 278, 287).

As it has been said about

> "depositions taken pursuant to law. They are the product of the *power of the State* to compel the testimony of witnesses *rather than of the ingenuity or resourcefulness of any lawyer*. The State makes available its *compulsory* process to compel witnesses to attend and give testimony on a pretrial deposition in order to assist in the ascertainment of the truth." *McGill* v. *Illinois Power Co.*, 18 Ill. 2d 242, 246, 163

N.E. 2d 454, 457 (Nov., 1959). (Emphasis added). This was reaffirmed by the Illinois Supreme Court in *Tansor* v. *Checker Taxi Co.*, 27 Ill. 2d 250, 188 N.E. 2d 659, 662-663 (March, 1963).

The State Court Deposition Examiner, who was on other occasions an attorney, and collaborators, were acting "under color of" law, irrespective of the fact that they had no uniforms, revolvers, etc.

II.

The State's compulsory discovery deposition power is used thousands of times every day and every week. For example, every civil court litigant in Illinois is subject to this State compulsory deposition power and the statute, in fact, says that the deposition of "any party or person" may be taken. (Chapter 110, Section 101.19, Illinois Rev. Stat. 1961).

> "Courts of law had no power at common law to compel a witness to give his deposition, and *such power exists now only by virtue of the statutes providing for exercise of such authority.* (Citing authorities)." *The People ex rel: Prince* v. *Graber*, 397 Ill. 522, 525, 74 N.E. 2d 865, 866 (1947). (Emphasis added).

> "Where a master, magistrate *or other person* takes evidence in a cause, under an order of the court wherein the cause is pending, such officer *or other person is the mere instrument of the court*, and is subject to its orders. *In legal effect, such evidence is taken before the court.*" *Greer* v. *Young*, 120 Ill. 184, 189-190, 11 N.E. 167, 169. (Emphasis added).

Under Illinois custom, practice, and usage, the State Court Deposition Examiner is in charge of the deposition and the notary-court reporter merely attends to take stenographic notes. The deposition proceedings, under Illinois custom, practice, and usage, are without supervision.

The misuse of power, possessed by respondents by virtue of the State Court Order and made possible only because the respondents were clothed with the authority of the State compulsory deposition power, to inflict "trial by ordeal" upon a witness, a paraplegic cripple, brings up Federal questions regarding the Fourteenth Amendment guarantee of Due Process and Equal Protection of the Laws, apparently not heretofore resolved in respect to agents of government obtaining discovery information in a *civil* case by fear of hurt, torture, or exhaustion. Such Federal questions should be settled so that a citizen is guaranteed Due Process and the Equal Protection of the Laws, not only in criminal discovery proceedings but in *civil* discovery proceedings as well.

As this Court said, in a criminal case, after stating authorities,

> "The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. *Compulsion by torture • • • is a different matter.*
>
> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy • • • (But) it does not follow that it may substitute *trial by ordeal.* The rack and torture chamber may not be substituted for the witness stand." *Brown* v. *State of Mississippi*, 297 U.S. 278, 285-286, 56 S. Ct. 461, 464-465, 80 L. Ed. 682. (Emphasis added).
>
> "The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process." *Adamson* v. *People of State of California*, 332 U.S. 46, 54, 67 S. Ct. 1672, 1677.

"We reject the rack, the thumbscrew, and the wheel, because they affront the dignity of man. Torture may be a short cut for getting at the truth. But it is *not a civilized practice.*" *The Right of the People*, by William O. Douglas, 1958, page 154. (Emphasis added).

By the Bill of Rights the Star Chamber is outlawed in the United States. The historical background of our Constitution indicates that,

"By abolition of the Court of Star Chamber (1641) the English Parliament, in dramatic fashion, reaffirmed the principle of due process of law as established by Magna Carta." *Sources of Our Liberties*, American Bar Foundation, 1959, page 125.

Misuse of power, possessed by respondents, by virtue of the State Court Order and made possible only because the respondents were clothed with the authority of the State compulsory deposition power, to torture and injure a paraplegic cripple is

"conduct that shocks the conscience, • • • this course of proceeding by agents of government to obtain (discovery) is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation." *Rochin v. People of California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209-210, 96 L. Ed. 183.

And the Court continues,

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." 342 U.S. 165, 172, 72 S. Ct. 205, 210.

"For repeated and unredressed attacks on the constitutional liberties of the humble will tend to destroy the foundations supporting the constitutional liberties of everyone. The test of the moral quality of a

civilization is its treatment of the weak and powerless." *United States ex rel. Caminito* v. *Murphy*, 2 Cir., 222 F. 2d 698, 706.

As one Court of Appeals said of the Civil Rights Statutes and unconstitutional deprivations,

> "The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple." *Brazier* v. *Cherry*, 5 Cir., 293 F. 2d 401, 404 (July, 1961).

III.

A diligent search failed to uncover an authoritative pronouncement by this Court on the scope and construction of 42 U.S.C.A. Section 1985(2). The portions of Section 1985(2) which are particularly applicable to petitioner's case are:

> "* * * if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State * * *, with intent to deny to any citizen the equal protection of the laws."

and most particularly applicable is:

> "*or to injure him* * * * for lawfully enforcing, or attempting to enforce, the right of any person * * * to the equal protection of the laws." (Emphasis added).

In *Snowden* v. *Hughes*, 1943 (321 U.S. 1, 64 St.Ct. 397, 88 L.Ed. 497) this Court dealt with former Title 8 U.S.C.A. Sec. 47(3), now 42 U.S.C.A. Sec. 1985(3), but did not reach the provisions of 1985(2), under which petitioner's suit arises, regarding two or more persons in any State who "conspire for the purpose of preventing or hindering the constituted authorities of any State * * * from giving or securing to all persons within such State * * * the equal protection of the laws * * *."

In *Collins* v. *Hardyman*, 1951 (341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253), this Court dealt with the provisions of former Title 8 U.S.C.A. Sec. 47(3), now 42 U.S.C.A. Sec. 1985(3).

As it was pointed out by Mr. Justice Harlan, concurring in *Monroe* v. *Pape*:

> "I do not think this Court's decision in *Collins* v. *Hardyman*, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253, can properly be viewed as determining the scope of the provision of Sec. 1985 which refers to conspiring 'for the purpose of preventing * * * the constituted authorities of any State * * * from giving * * * the equal protection of the laws * * *.' Not only did the Court specifically disclaim any consideration of this provision, but it proceeded to emphasize that the petitioners therein had only been subjected to a private discrimination since 'There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it.' 341 U.S. at page 661, 71 S.Ct. at page 942. The holding that the equal protection of the law is unaffected by discriminatorily motivated violations of state law so long as the instrumentalities of law enforcement remain free, able, and willing to remedy these violations *is clearly based upon premises which cannot control the quite dissimilar case of a conspiratorial attempt to affect the fairness of these instrumentalities*, 'the constituted authorities of any State'." 365 U.S. 167, 200, 81 S.Ct. 473, 491, 5 L.Ed.2d 492, footnote 9. (Emphasis added).

In *Monroe* v. *Pape* this Court did not deal with the provisions of 42 U.S.C.A. Section 1985 (365 U.S. 167, 200, 81 S.Ct. 473, 491).

The Court of Appeals by ignoring and rejecting in petitioner's suit Section 1985(2) and Section 1985(3), gives no effect to those Sections. The Court of Appeals' deci-

sion casts a serious doubt as to the validity and application of Sections 1985(2) and 1985(3). In so doing, the Court of Appeals sets up a precedent clearly contrary to the intentions of Congress in passing R.S. Section 1980 (now 42 U.S.C.A. Sec. 1985):

> "If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable." Statement of Representative Burchard, Congressional Globe, 42d Congress, 1st Session, App. 315.

The Court of Appeals' decision is contrary to the clear language of Section 1985(2): "* * * or to injure him * * *" for lawfully enforcing, or attempting to enforce, "the right of any person * * * to the equal protection of the laws". The Court of Appeals indicates that the respondents were not under color of law. (Appendix A, *infra*, pages 32-33). The language of Sections 1985(2) and 1985(3) does not indicate that the conspirators necessarily have to be "under color of" law, although the petitioner's position is that respondents *were* "under color of" law.

As Mr. Justice Harlan, concurring in *Monroe* v. *Pape*, pointed out by way of comparing 42 U.S.C.A. Sec. 1983 with 42 U.S.C.A. Sec. 1985:

> "If the same Congress which passed what is now Sec. 1983 also provided remedies against two or more non-officials who conspire to prevent an official from granting equal protection of the laws, see 42 U.S.C. Sec. 1985, 42 U.S.C.A. Sec. 1985, then it would seem almost untenable to insist that this Congress would have hesitated, on the grounds of lack of full state approval of the official's act, to provide similar remedies against an official who, unauthorized, denied the equal protection of the laws on his own initiative.

> "* * * Indeed it is difficult to attribute to a Congress which forbad two private citizens from hindering an official's giving of equal protection an intent to leave that official free to deny equal protection of his own accord." 365 U.S. 167, 199-200, 81 S.Ct. 473, 490.

IV.

The Court of Appeals states that the petitioner's "case has never been retried in the state court and is still pending." (Appendix A, *infra*, page 31). The fact that the state case was not retried and is still pending is due to no fault of the petitioner. (See, Petition for Rehearing, with attached Motion to Expunge, page 3, last par.) But no explanation should be necessary because it is not relevant to deciding whether the Federal Court has jurisdiction of a suit seeking to hold liable a State Court Deposition Examiner and collaborators for the misuse of power they possessed by virtue of the State Court Order and made possible only because they were clothed with the authority of the State compulsory deposition power. The Court of Appeals states that the petitioner did not object to the conduct of respondent Martin, the State Court Deposition Examiner who was on other occasions an attorney. This is a supposed fact *directly opposite* to the record. (See, Petition for Rehearing, with attached Motion to Expunge, page 2, par. "C", and pp. 4-5, subpar. 6).

In addition, the Court of Appeals indicates that the petitioner has sued, in the Superior Court of Cook County, Illinois, the same persons who are respondents here. (Appendix A, *infra*, page 31, footnote 1).

As this Court said in *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482:

> "It is no answer that the State has a law which if enforced would give relief. *The state remedy is supplementary to the state remedy*, and the latter

need not be first sought and refused before the federal one is invoked." (Emphasis added).

This view was reaffirmed by this Court in *McNeese v. Board of Ed. for Com. U. Sch. Dist.* 187, *Cahokia, Ill.*, 83 S.Ct. 1433, 1435-1436, 31 LW 4567, 4568 (June 3, 1963) where this Court said of 42 U.S.C.A. Sec. 1983:

> "That is the statute that was involved in *Monroe* v. *Pape, supra;* and we reviewed its history at length in that case. 365 U.S. 171 *et seq.*, 81 S.Ct. 473, 5 L.Ed. 2d 492. The purposes were several fold,—to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' (*id.*, 174, 81 S.Ct. 477) and to provide a remedy in the federal courts supplementary to any remedy any State might have. Id., 180-183, 81 S.Ct. 480-482. *We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.*" (Emphasis added).

This Court takes judicial notice that in Illinois "the state remedy, though adequate in theory, was not available in practice," and that petitioner's suit in the Superior Court of Cook County, Illinois, was dismissed on the sole basis of the pendency in the U.S. District Court for the Northern District of Illinois, Eastern Division, of another action between the same parties. See, *Skolnick v. Martin, et al.*, No. 807, Petition for Writ of Certiorari to the Supreme Court of Illinois, page 12, certiorari denied 83 S.Ct. 951, 31 LW 3305 (March 25, 1963).

But in the case at bar, the petitioner does *not* seek injunctive relief against the State Court Deposition Examiner and his collaborators. The petitioner seeks to hold the respondents liable for damages. The petitioner does

not ask the Federal Court to review or supervise the state civil proceedings of the Circuit Court of Cook County, Illinois.

It has been said, however, in a suit that did seek both damages and injunctive relief:

> "The abstention doctrine does not permit federal district courts 'to defer to the state courts for the decision of federal constitutional questions.' (Citing authority)." *Marshall* v. *Sawyer*, 9 Cir., 301 F.2d 639; 646 (March, 1962).

The Court of Appeals does not distinguish between petitioner's suit against a State Court Deposition Examiner who was on other occasions an attorney, and suits against lawyers who participate in the trial of state court litigation. (Appendix A, *infra*, page 33). In thus not distinguishing between the two, the Court of Appeals gives no effect to the Civil Rights Acts.

What was said in a criminal case should be true here:

> "Would Noia's failure to appeal have precluded him from an action under the Civil Rights Acts against his *inquisitors*? The Act of February 5, 1867, *like the Civil Rights Acts, was intended to furnish an independent, collateral remedy for certain privations of liberty*." *Fay* v. *Noia*, 83 S.Ct. 822, 843 (March, 1963). (Emphasis added).

If an accused person can sue his inquisitors under the Civil Rights Acts, why then cannot a witness (petitioner), a parapiegic cripple tortured and injured by a State Court Deposition Examiner and collaborators under the pretext of a compulsory civil discovery deposition, also sue *his* inquisitors? Such a Federal question appears to be unresolved and should be settled by this Court of last resort.

V.

The decision by the Court of Appeals in petitioner's case is in direct conflict with other decisions as follows:

A. The Court of Appeals indicates that the District Court did not have jurisdiction.

(1) Regarding the jurisdiction of the District Court under 28 U.S.C.A. Sec. 1343 and under 42 U.S.C.A. Sections 1983 and 1985(2), the decision is in direct conflict with, and "in head-on collision with", *Harmon v. Superior Court*, 9 Cir., Sept., 1962, a Civil Rights Act suit against a sheriff, court personnel, etc., in which it was said:

"Appellant has attempted, however imperfectly, to state a claim under acts of Congress that expressly give the District Court jurisdiction. *That court then had jurisdiction.* (Citing authorities)." 307 F.2d 796, 798. (Emphasis added);

"The right to a hearing on the merits of a claim over which the court has jurisdiction is of the very essence of our judicial system * * *." 307 F.2d 796, 798.

(2) In direct conflict with *Bell v. Hood*, on what is now the provisions of 28 U.S.C.A. Sec. 1331:

"* * * where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, *the federal court * * * must entertain the suit.* * * * The reason for this is that *the court must assume jurisdiction to decide whether the allegations state a cause of action* on which the court can grant relief as well as to determine issues of fact arising in the controversy." 327 U.S. 678, 681-682, 66 S.Ct. 773, 776, 90 L.Ed. 939. (Emphasis added).

"Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided *after* and

not before the court has assumed jurisdiction over the controversy." 327 U.S. 678, 682. (Emphasis added).

(3) In direct and complete conflict with *Monroe* v. *Pape*, where it was said about 42 U.S.C.A. Sec. 1983 (R.S. 1979):

"It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. 167, 180, 81 S.Ct. 473, 480, 5 L.Ed.2d 492.

(4) In direct conflict with *Baldwin* v. *Morgan*, 5 Cir., 1958,

"But those who directly assist the admitted state agency in carrying out the unlawful action become a part of it and subject to the sanction of Section 1983." 251 F.2d 780, 788.

(5) In direct conflict with *Watkins* v. *Oak Lawn Jockey Club*, 8 Cir., 1950,

"And there is no dispute in respect of the applicable law. Since jurisdiction of the federal court is based upon a federal statute and the parties are residents of the same state * * * federal law and not state law controls." 183 F.2d 440, 442.

(6) In direct conflict with *Flemming* v. *South Carolina Electric and Gas Company*, 4 Cir., 1955,

"We think that there can be no question as to the jurisdiction of the court. Under 28 U.S.C. Sec. 1343(3) the District Courts are given jurisdiction of actions to redress the deprivation, under color of any state law, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens." 224 F.2d 752, 753.

(7) Regarding the jurisdiction of the District Court, the decision of the Court of Appeals in petitioner's case is in direct conflict with *Hague* v. *C.I.O.*, 307 U.S. 496, 507-514, 527-532, 59 S.Ct. 954, 960-963, 969-971, 83 L.Ed. 1423.

(8) Regarding the jurisdiction of the District Court, the decision is in direct conflict with *Douglas* v. *City of Jeanette*, 319 U.S. 157, 161, 63 S.Ct. 877, 880, 87 L.Ed. 1324.

(9) In direct conflict with *McNeese* v. *Board of Ed. for Com. U. Sch. Dist.* 187, *Cahokia, Ill.*,

"For petitioners assert that respondents have been * * * depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. (Citing *Monroe* v. *Pape*, 365 U.S. 167, 171-187). *Such claims are entitled to be adjudicated in the federal courts.* (Citing authorities)." 83 S.Ct. 1433, 1437, 31 LW 4567, 4568-4569, (June 3, 1963). (Emphasis added).

(10) In direct conflict with *Moss* v. *Jones*, 6 Cir., April, 1961,

"The next proposition is that he can protect himself against this by a tort action in State court. This proposition is succinctly disposed of by the United States Supreme Court opinion of February 20, 1961, in the case of *Monroe et al.*, v. *Pape et al.*, 81 S.Ct. 473. There is no question in our mind but that the Supreme Court has unequivocally held that a person may not be denied his civil rights action in Federal Court because of the existence of a state law that may be enforced to give relief." 288 F.2d 342, 344.

B. The Court of Appeals indicates the respondents were not under color of law.

(1) The Court of Appeals' decision in petitioner's case, regarding "under color of" law, is in direct conflict with *Ex parte Virginia*, 100 U.S. 339, 346-347, 25 L.Ed. 676, 679.

(2) In direct conflict with *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U.S. 278, 287, 33 S.Ct. 312, 314, 57 L.Ed. 510.

(3) In direct conflict with *United States* v. *Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368.

(4) In direct conflict with *Screws* v. *United States*, 325 U.S. 91, 108-113, 65 S.Ct. 1031, 1038-1041, 89 L.Ed. 1495.

(5) In direct conflict with *Williams* v. *United States*, 341 U.S. 97, 99, 71 S.Ct. 576, 578, 95 L.Ed. 774.

(6) In direct conflict with *Monroe* v. *Pape*, 365 U.S. 167, 171-172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492.

(7) In direct conflict with *Marshall* v. *Sawyer*, 9 Cir., March, 1962,

"The (respondents') conduct was engaged in under color of state law if they were clothed with the authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. (Citing authorities). Whether there is 'color' of state law is a *federal, not a state question*. Were this not true a state, acting through its legislature or courts, would have it within its power to immunize its agencies and officials from liability under the Civil Rights Acts." 301 F.2d 639, 646. (Emphasis added).

(8) In direct conflict with *Baldwin* v. *Morgan*, 5 Cir., 1958,

"But those who directly assist the admitted state agency in carrying out the unlawful action become a part of it and *subject to the sanction of Section* 1983." 251 F.2d 780, 788. (Emphasis added).

(9) In direct conflict with *Valle* v. *Stengel*, 3 Cir., 1949,

"The fact that Stengel, a law-enforcement officer, was acting in defiance of the law * * * will not serve as a defense and, since the complaint alleges in effect that he aided and abetted * * * the (other) defendants, his actions may be attributed to them and treated as their own." 176 F.2d 697, 702.

(10) In direct conflict with *Stringer* v. *Dilger*, 10 Cir., Jan., 1963,

"The evidence here clearly establishes that Dilger was acting pursuant to state law * * * and he was, therefore, acting 'under color of' state law even though such actions may have been in excess of his authority." 313 F.2d 536, 540.

(11) In direct conflict with *Hoffman* v. *Halden*, 9 Cir., 1959,

"But the broad scope of the Civil Rights Acts would impose liability on state officers for acts done under color of law,—*acts done within*, as well as without, *the scope of their authority*." 268 F.2d 280, 299. (Emphasis in the opinion itself).

C. Petitioner's suit arises under R.S. 1980, now 42 U.S.C.A. Section 1985(2)(3). The Court of Appeals' decision conflicts with decisions in other cases arising under the provisions of the same section.

(1) Regarding R.S. 1980, the decision is in direct conflict with *McShane* v. *Moldovan*, 6 Cir., 1949, 172 F.2d 1016, 1018-1019.

(2) In direct conflict with *Lewis* v. *Brautigam*, 5 Cir., 1955, 227 F.2d 124, 127-128.

(3) In direct conflict with *Balduin* v. *Morgan*, 5 Cir., 1958, 251 F.2d 780, 790-791.

(4) In direct conflict with *Hoffman* v. *Halden*, 9 Cir., 1959, 268 F.2d 280, 292.

(5) In direct conflict with, and "in head-on collision with", *Harmon* v. *Superior Court*, 9 Cir., 307 F.2d 796 (1962), a suit arising under the provisions of 42 U.S.C.A. Section 1985(2).

D. The Court of Appeals indicates that the acts of the respondents were not in violation of petitioner's rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United Staes.

(1) The Court of Appeals' decision is in direct conflict with *Brown* v. *State of Mississippi*,

"The rack and torture chamber may not be substituted for the witness stand." 297 U.S. 278, 285-286, 56 S. Ct. 461, 465, 80 L. Ed. 682.

(2) In direct conflict with *Adamson* v. *People of State of California*,

"The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. It forbids any other type of coercion that falls within the scope of due process." 332 U.S. 46, 54, 67 S. Ct. 1672, 1677.

(3) In direct conflict with *Rochin* v. *People of California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209-210, 96 L. Ed. 183.

(4) In direct conflict with *Brazier* v. *Cherry*, 5 Cir. July, 1961, where there was a brutal attack under color of state laws.

"These actions were intended to, and did, deprive the (petitioner) of the rights and privileges of being secure in his person, of due process and equal protection of the law." 293 F. 2d 401, 402.

(5) In direct conflict with *Cohen* v. *Norris*, 9 Cir., January, 1962,

"In our view *Monroe* v. *Pape* announces the rule that an allegation of a purpose to discriminate or a purpose to deprive one of any federal right, is not essential to the statement of a claim under Sec. 1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment." 300 F. 2d 24, 29.

CONCLUSION.

For the reasons above stated it is respectfully submitted that the Petition for writ of certiorari be granted.

Respectfully submitted,

SHERMAN H. SKOLNICK,
Petitioner, Pro Se.

APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13948 SEPTEMBER TERM—APRIL SESSION, 1963

SHERMAN H. SKOLNICK,
Plaintiff-Appellant,
v.
CHARLES T. MARTIN, ARTHUR LILLY, and CHARLES R. PERRIGO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 7, 1963

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges.*

HASTINGS, *Chief Judge.* Plaintiff Sherman H. Skolnick appeals from a judgment order of the district court, Honorable Richard E. Austin presiding, dismissing his complaint for failure to state a claim upon which relief could be granted.

A brief resume of the background of this present action follows.

On May 23, 1958, plaintiff filed a civil damage action in the Circuit Court of Cook County, Illinois (58-C-7219). Defendants named in this state court action were his stock-

brokers, Hornblower and Weeks and the partners in that firm, including Arthur Lilly and Charles R. Perrigo. This complaint charged defendants with the breach of an alleged oral trust in handling plaintiff's speculation in the stock market. Charles T. Martin and J. William Hayton acted therein as attorneys for defendants.

On January 7, 1960, defendants took plaintiff's deposition in preparation for trial of that cause. Plaintiff was examined by attorney Martin concerning the stock transactions in question. Plaintiff's father, his attorney and court reporter were present, as were defendant's court reporter and Lilly and Perrigo. The deposition was transcribed and filed in the circuit court. It was used in a subsequent jury trial on January 18-26, 1961, which resulted in a disagreement of the jury. Neither plaintiff nor his attorney made any objections to the conduct of attorney Martin toward plaintiff at the taking of the deposition or during the course of the subsequent trial. The case has never been retried in the state court and is still pending.

On January 4, 1962, plaintiff filed the instant action in the United States District Court against Martin, Lilly and Perrigo. He sought to recover damages for alleged physical injuries charged to have been caused by alleged improprieties committed in the taking of his deposition on January 7, 1960.[1]

---

[1] On January 4, 1962, plaintiff filed a complaint for damages against Martin, Lilly and Perrigo in the Superior Court of Cook County, Illinois. He charged defendants therein with the same improprieties in the taking of his deposition on January 7, 1960, as alleged in the identical charges in the complaint filed on the same day in the federal court. On March 28, 1962, the state court dismissed this case; plaintiff appealed to the Supreme Court of Illinois which transferred the appeal to the Illinois Appellate Court on defendants' motion. On February 8, 1963, plaintiff filed a Petition for Certiorari in the United States Supreme Court (No. 807) for review of the transfer order.

It is conceded there is no diversity of citizenship present in this case. Plaintiff attempts to invoke jurisdiction of the federal courts by claiming he suffered his injuries because of an alleged violation of the Federal Civil Rights Acts, 42 U. S. C. A. §§ 1981-1988.

Plaintiff is a paraplegic and a member of the white race. He claims he was mistreated by attorney Martin, who was at the time acting for Lilly and Perrigo. In substance, the alleged improprieties charged were that at the taking of the deposition pursuant to state court process he was compelled to sit for about four hours in a straight chair without arm rests and without his crutches; that his father was prevented from making him more comfortable; that attorney Martin stood over him and screamed at him and took an envelope containing papers from him; and that defendants operated a secret recording device concealed in an adjoining room. This alleged misconduct is charged to have contributed to his further disability.

In short, plaintiff contends that defendants have misused the state power of compulsory process to inflict personal injuries upon him, thereby acting under color of state law and in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff asserts jurisdiction under the Federal Civil Rights Acts, *supra*, by virtue of 28 U. S. C. A. §§ 1343 and 1331. His principal reliance is upon the holding in *Monroe v. Pape*, 365 U. S. 167 (1961). We believe this reliance is misplaced.

The acts complained of arose in a pretrial deposition proceeding in a state court action merely between private

parties, all of whom were residents of Illinois. The acts complained of were those of an attorney representing his clients. This is a far cry from *Monroe* v. *Pape*, *supra*, where defendants were city policemen charged with brutality in arresting the plaintiff. The wrongs alleged there were committed by officers of the law acting under color of state law. They misused the power conferred upon them.

We have found no case, and none has been cited to us, holding that federal courts may, under the Federal Civil Rights Act, review or supervise civil proceedings in a state court between private parties. On the other hand, the authorities thus far have held to the contrary.

The instant case was private litigation in which the state did no more than furnish the forum. It had no interest whatever in the outcome. There was no denial of rights under the Fourteenth Amendment or a claim stated upon which relief could be granted under the Federal Civil Rights Acts: *Hanna* v. *Home Insurance Company*, 5 Cir., 281 F. 2d 298 (1960), cert. denied, 365 U. S. 838; *Johnson* v. *Stone*, 7 Cir., 268 F. 2d 803 (1959); *Smith* v. *Village of Lansing*, 7 Cir., 241 F. 2d 856 (1957); *Moffett* v. *Commerce Trust Co.*, 8 Cir., 187 F. 2d 242 (1951), cert. denied, 342 U. S. 818; *Campo* v. *Niemeier*, 7 Cir., 182 F. 2d 115 (1950); *Bottone* v. *Lindsley*, 10 Cir., 170 F. 2d 705 (1948), cert. denied, 336 U. S. 944.

Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts. *Cooper* v. *Wilson*, 6 Cir., 309 F. 2d 153 (1962); *Swift* v. *Fourth National Bank of Columbus, Georgia*, D. C. M. D. Ga., 205 F. Supp. 563 (1962).

Plaintiff complains that the district court erred in ruling on the motion to dismiss the complaint without hearing oral argument. There is no merit in this contention. Plaintiff filed voluminous written objections and a brief in support thereof, which were considered by the trial court. There was no abuse of discretion in not permitting oral arguments thereon. *Weir v. Chicago Plastering Institute*, 7 Cir., 272 F. 2d 883, 888 (1959).

For the foregoing reasons, we hold that the judgment dismissing plaintiff's complaint must be affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 19, Illinois

Tuesday, May 7, 1963

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. WM. G. KNOCH, Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

SHERMAN H. SKOLNICK,
Plaintiff-Appellant,

No. 13948 v.

CHARLES T. MARTIN, ARTHUR LILLA, and CHARLES R. PERRICO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, *Affirmed*, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, June 6, 1963.

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. WM. G. KNOCH, Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

SHERMAN H. SKOLNICK,
Plaintiff-Appellant,

No. 13948 v.

CHARLES T. MARTIN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition of plaintiff-appellant for rehearing of this cause be, and the same is hereby, *Denied.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 427

SHERMAN H. SKOLNICK,

Petitioner

vs.

CHARLES T. MARTIN; AND ARTHUR LILLY, AND CHARLES R. PERRIGO,

Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. MCMILLEN,
CHARLES T. MARTIN,
J. WILLIAM HAYTON,
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RAndolph 6-2929,
Attorneys for Respondents, Arthur Lilly and Charles R. Perrigo.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 427.

SHERMAN H. SKOLNICK,

Petitioner,

vs.

CHARLES T. MARTIN AND ARTHUR LILLY, AND CHARLES R. PERRIGO,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The facts are accurately stated by the Court of Appeals 317 F. 2d 855; for the related case see 317 F. 2d 857 which is the subject of Skolnick's other petition for certiorari, No. 397.

On May 23, 1958, Skolnick sued his stockbrokers, including Lilly and Perrigo, in the Circuit Court of Cook County. Skolnick alleged the breach of an alleged oral trust in handling his speculations in the stock market.

On January 7, 1960, defendants took Skolnick's deposition. He was interrogated by defendants' attorney, Martin. This case charging breach of an alleged oral trust was tried January 18 to 26, 1961 and resulted in a hung jury. There has been no retrial. (P. 20.)

On January 4, 1962, two years after the taking of Skolnick's deposition, he filed the present case in the United States District Court against his stockbrokers, Lilly and Perrigo, and their attorney Martin. Skolnick alleges that defendants by means of their agent Martin, caused bodily injuries during the taking of his deposition on January 7, 1960. (Appendix, pp. 3-7 Skolnick Brief in Court of Appeals.)

Skolnick's father, his attorney, and his court reporter were present at his deposition along with defendant's court reporter, defendants Lilly and Perrigo and their attorney, Martin. (Plaintiff's complaint appearing App. p. 5 ¶ 11(e); p. 6 ¶ 11(g) Petitioner's Brief in Court of Appeals.) The deposition was filed in the Circuit Court and used in the subsequent trial on January 18 to 26, 1961.

The present complaint contains no allegation that Skolnick or his attorney ever made any charge in the Circuit Court of Cook County of mistreatment during the taking of the deposition. (App. pp. 3-7 Skolnick Br. in Ct. of App.) Instead, Skolnick waited two years and on January 4, 1962 filed this so-called civil rights case against Lilly, Perrigo and Martin and claimed bodily injury during the deposition on January 7, 1960. On the same day, January 4, 1962, Skolnick filed in the Superior Court of Cook County a similar complaint against the same defendant.

If Skolnick or his attorney had any criticism as to the manner of taking his deposition the remedy was to object on the record and leave the deposition and call the matter to the attention of the presiding judge of the Circuit Court. The rule of the Illinois Supreme Court relating to depositions provides: (Ill. Rev. Stat. 1961 Ch. 110 § 101.19-6(3).)

> "At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in any manner that unreasonably annoys,

> embarrasses, or oppresses the deponent or party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided by these rules;"

The complaint contains no allegation that Skolnick ever complained to the presiding judge as to the manner of the taking of the deposition and sought a protective order pursuant to this rule. (App. pp. 3-7 Skolnick Br. in Ct. of App.) Instead of so doing Skolnick waited two years and filed this so-called civil rights case in the United States District Court.

Skolnick is asking this Court to fashion a rule that any plaintiff in a civil case in a state court whose deposition is being taken can ignore the state procedure governing the conduct of depositions and can wait two years to file a so-called civil rights case in a federal district court and complain that the attorney who interrogated him when taking his deposition forced him to sit in a low back chair, screamed at him, etc., etc., and thereby caused bodily injuries.

The Court of Appeals did not, as Skolnick claims (p. 3), affirm a dismissal for lack of jurisdiction. It affirmed the District Court's dismissal for failure to state a claim upon which relief could be granted (Opinion of Court of Appeals, Petition pp. 30, 34). This is an explicit recognition and exercise of jurisdiction and Skolnick's assertion of a conflict between the decision of the Court of Appeals and the decisions cited by him at pages 23-25 is without basis.

I.

No Cause of Action Is Stated Under 42 U. S. C. § 1983 Because: (a) Defendants Did Not Act Under Color of State Law; and (b) There Was No Deprivation of Any Rights, Privileges or Immunities Secured by the United States Constitution.

Plaintiff relies on 42 U. S. C. § 1983. This statute has no bearing for the following reasons:

First, an attorney taking the plaintiff's deposition in a civil case is not a state functionary acting under color of state law within the meaning of the Federal Civil Rights Acts. *Cooper* v. *Wilson*, 6 Cir. 309 F. 2d 153 (1962); *Swift* v. *Fourth National Bank of Columbus, Georgia*, D. C. M. D. Ga. 205 F. S. 563 (1962).

In *Monroe* v. *Pape*, 365 U. S. 167, relied on by Skolnick, the defendants were Chicago police officers who broke into plaintiff's home, arrested him, took him to the police station, held him on "open charges," interrogated him and refused to take him before a magistrate. These police officers were properly held to be acting under color of state law. Skolnick's complaint does not and cannot allege that a private attorney acts under color of state law when he takes the deposition of a plaintiff in a civil case in a state court. The Court of Appeals' decision is also not in conflict with any of the other cases cited by Skolnick (pp. 26-27).

Second, any right to be free from bodily injury during a deposition in a civil case in a state court is not "the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws. . . ." *Collins* v. *Hardyman*, 341 U. S. 651, 660-2; *Snowden* v. *Hughes*, 321 U. S. 1, 6-7; *Hanna* v. *Home Insurance Company*, 5 Cir. 281 F. 2d 298 (1960), cert. denied, 365 U. S. 838; *Johnson* v. *Stone*, 7 Cir. 268 F. 2d 803 (1959); *Smith* v. *Village of Lansing*, 7 Cir.

241 F. 2d 856 (1957); *Moffatt* v. *Commerce Trust Co.*, 8 Cir. 187 F. 2d 242 (1951), cert. denied, 342 U. S. 818; *Campo* v. *Niemeyer*, 7 Cir. 182 F. 2d 115 (1950); *Baltone* v. *Lindsley*, 10 Cir. 170 F. 2d 705 (1948) cert. denied, 336 U. S. 944."

Monroe v. *Pape*, 365 U. S. 167 in no way supports Skolnick's suit. In *Monroe* v. *Pape* the plaintiff alleged a deprivation of his guarantee against unreasonable searches and seizures contained in the Fourth Amendment and made applicable to the states by the Fourteenth Amendment. Skolnick makes no charge of a deprivation of a right secured by the Constitution. No plaintiff is deprived of a constitutional right when he is allegedly forced to sit "in a low back, narrow, chair," etc. causing alleged bodily injury during the taking of his deposition in a civil case in a state court.

Skolnick's references (p. 16) to "the rack, the thumbscrew and the wheel" shows that he is aware that he must allege a deprivation of a constitutional right. Skolnick cannot assume the pose of a defendant in a criminal case and argue that in violation of the Fifth Amendment he was "compelled in any criminal case to be a witness against himself." Skolnick was simply a plaintiff in a civil case seeking damages, whose deposition was taken. There is no conflict with the cases cited by Skolnick (pp. 28-29).

II.

No Cause of Action Is Stated Under 42 U. S. C. § 1985(2) and (3) Because There Was No Denial of Equal Protection of The Law.

Skolnick also relies on 42 U. S. C. § 1985 (2) and (3). These statutes have no bearing for the following reasons:

There is not even an allegation in Skolnick's complaint that defendants, in violation of § 1985(2) conspired "with

intent to deny to any citizen [Skolnick] the equal protection of the laws, or to injure him or his property *for* lawfully enforcing . . . the right of any person . . . to the equal protection of the laws."

There is no allegation in Skolnick's complaint that defendants, in violation of § 1985(3) "conspired . . . for the purpose of preventing or hindering the constituted authorities of any state . . . from giving or securing to all persons . . . the equal protection of the laws."

In fact Skolnick tried his case before the Circuit Court judge for six days, viz., January 18 to 26, 1961, without ever mentioning the alleged improprieties during the taking of the deposition on January 7, 1960. And, of course, he did not seek a protective order pursuant to Ill. Rev. Stat. 1961 Ch. 110 § 101.19-6 (3). It would be ridiculous to allege (and Skolnick does not allege) that defendants conspired to prevent plaintiff from telling the presiding trial judge of alleged improprieties during the deposition or from filing a motion for a protective order.

Plaintiff's complaint has nothing to do with intent to deny equal protection of the laws, or denial of equal protection of the laws; it simply alleges improprieties during the taking of a deposition. In *Collins* v. *Hardyman* the Court, in construing 42 U. S. C. § 1985, said: (341 U. S. 651, 661-2)

> "The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one negligibor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor

"their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws*, and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob."

In order to allege a denial of equal protection of the laws it is necessary to allege an "intentional or purposeful discrimination between persons or classes." *Snowden v. Hughes*, 321 U. S. 1, 7. Here the complaint makes no such allegation.

Despite Skolnick's assertion to the contrary, the decision of the Court of Appeals is not in conflict with any of the cases cited (pp. 27-28).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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No. 427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

SHERMAN H. SKOLNICK,

Petitioner,

vs.

CHARLES T. MARTIN, ARTHUR LILLY, and CHARLES R. PERRIGO,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully asks this Court to grant a rehearing of its order of November 12, 1963, 32 LW 3176, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above entitled case as prayed for in the petition filed August 31, 1963.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT.

The Court of Appeals' ruling in petitioner's case certainly would cause every witness, every deponent, to look with alarm upon the State's compulsory attendance of witnesses such as himself or herself. If such a witness is tortured, injured, and intimidated by agents of government, he cannot invoke the sanctions of the Federal courts. Such a ruling undermines the judicial processes by setting wrongdoers free to torture witnesses with impunity.

In the words of the respondents:

> "* * * any right to be free from bodily injury during a deposition in a civil case in a state court is not 'the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws.'" (See, Brief for Respondents in Opposition to Petition for Writ of Certiorari, page 4).

Wrongdoing, under pretense of authority, could hardly be more clearly stated or more boldly put, and still be within the bounds of courtesy.

The Court of Appeals ruling in petitioner's case is in direct conflict with an intervening decision of another Court of Appeals:

> "The defendants filed no answer but, pursuant to their motion, the District Court dismissed the complaint on the grounds that it failed to state a claim upon which relief could be granted and that it failed to show that the action was one arising under the Constitution and laws of the United States. The posture of the case requires us, for the purposes of this appeal, to take the plaintiff's allegations as true. Intimating no view on whether the plaintiff should ultimately prevail, *we hold that it was error for the District Court to dismiss the complaint without holding a hearing to determine the facts.*" *Lee v. Judge*, 4 Cir., 321 F. 2d 480, 483 (published October 7, 1963). (Emphasis added).

> "From his complaint it is evident that he claims substantial injury, under color of state law, at least to his right to the equal protection of the laws; and he also appears to rely upon the due process and the privileges and immunities clauses of the Fourteenth Amendment. *Federal jurisdiction over this complaint is well founded and the possible existency of state remedies does not affect this jurisdiction.* (Citing *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939, 1946; *Monroe v. Pape*, 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 492, 1961; *McNeese v. Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622, 1963; *Moss v. Jones*, 288 F. 2d 342, 344, 6th Cir., cert. denied, 368 U.S. 868, 82 S. Ct. 98, 7 L. Ed. 2d 65, 1961)." 321 F. 2d 480, at 484. (Emphasis added).

The petitioner in his Petition to this Court relies upon the same cases as the Court of Appeals for the Fourth Circuit. (See, Petition, at pp. 20-21; 23-24, and page 25).

The District Court never permitted the petitioner to be heard on the facts, or merits, of his case. Yet, the Court of Appeals affirms such a judgment. If Civil Rights cases in the Seventh Circuit are to be narrowly restricted primarily to school segregation cases and police brutality cases because this Court has already made authoritative pronouncements on such cases—then in all fairness, this Court should indicate that a citizen in the 7th Circuit will not be able to enforce his rights, or be heard on the merits of his Civil Rights case, *except in such cases*. It is totally unfair to hold forth empty promises, unenforceable Constitutional rights; Federal protections and sanctions unavailable in practice.

The petitioner, like every other citizen, looks to his national government for protection and, of course, to the courts of the national government. Protection is inherent in the very reasons for having government—it is the why

and wherefore of civilized society. The legislative debates preceding the passage of the Ku Klux Act, April 20, 1871 (now 42 U.S.C.A. Sec. 1983 and 1985) through which this petitioner has sought, apparently in vain, to secure the protections and sanctions of national government in those debates time and again can be found such language as:

> "American citizenship has but little worth if this law cannot be passed. How idle my declaration, 'I am an American citizen,' if all the rights which are seemingly made part and parcel of my possession as such a citizen may be at the mercy of assassins and the Government have not the right to protect me! *I do not wish to be told that I must look to my State for protection.* The Government claims my allegiance, and my life when it is in danger; why should it not protect me in these rights, for which that life may be given up?" Statement of Representative M. H. Dunnell of Minnesota, Congressional Globe, 42d Congress, 1st Session, Appendix 262. (Emphasis added).

Let us suppose that some fiend, some lawyer with a sadistic mind, wished to torture, intimidate, and injure an opponent of his client, and that opponent, a plaintiff in a state court lawsuit, happened to be physically disabled. How shall he dispose of such a person, once and for all, put an end to the lengthy litigation? How to get him out of the way, how to shut his mouth, yet not lay a hand on him [illegible] the plaintiff is, after all, a cripple, and not only a plaintiff but also a witness?

Such a fiend, knowing and seeing that the plaintiff is not only a paraplegic but has a twisted back as well, ponders the situation. "Sit" him to death! Now, there is an answer worthy of the most diabolical personality. For it is estimated that a paraplegic with a severe spinal condition can, literally, be "sit" to death in 3 to 5 hours on a chair without adequate armrests or back support. The

spine, unsupported by the paralyzed muscles, simply "folds up" to one side, impinging nerves, etc.

So, then all this demonic personality would have to do, particularly in Illinois, would be to see to it that he is appointed a State Court Deposition Examiner and then he can wield the power and the majesty of compulsory power—not in his capacity as a lawyer, but as an agent of government. In Illinois this awesome compulsory power compelling the attendance of witnesses is put into the hands of partisans, not impartial deposition examiners—but into the hands of the very person who is at other times the defendant's attorney. It is this "constituted authority" to which the deponent-litigant must look in vain for the Equal Protection of the Laws.

Now let us say that, by some horrendous misfortune of circumstance, the litigant-deponent's attorney is just recovering from a terrible accident and he walks haltingly with his leg in a partial cast and supported by a sturdy cane. And let us say, too, that the State Court judge, as it is the custom and practice, turns a deaf ear to the attorney's plea for minimum protection for the deponent. There we have the deponent, braces and crutches and all, in the first row of seats before the judge so that the judge might better see who it is that asks minimum protection. To no avail—protection denied, Court Order issued for the deposition to be held two hours later in the private enclosure of the Deposition Examiner.

There the citizen deponent is—at the mercy of sophisticated, modern-day assassins, in their carpeted torture chamber. The citizen deponent protests in vain, he cannot sit on *such* a chair. His attorney, arriving late because of his own slow-walking disability, protests in vain. Before the attorney arrives the deponent's crutches are

taken from him and hidden in a closet—he can leave, but how? and if he did leave, the sanctions of state government would fall down upon him, case dismissed, etc., etc. Four hours and twenty minutes the deponent survives the spinal pain and torment, protesting time and again for the record, his attorney protesting time and again. The tall Deposition Examiner is screaming down at the deponent, the Examiner hovers over this small hunched over person and snatches an envelope tucked into the deponent's pants. Fright, torment, pain, and then at times near-Stoic suffering.

Finally, after four hours and twenty minutes, the deponent tells the Deposition Examiner that the deponent will sue for being tortured so. The Deposition Examiner goes next door with the two persons who are on other occasions his clients, and there they whisper. The crutches are brought from their hiding place and the deponent is released, and on the way the deponent collapses and, delirious, he is transported to his home by his father who being an immigrant with no benefit of education is fearful to express his outrage against "government".

This is not supposition—this is, in fact, what happened.

By some blind miracle, the deponent has survived, but he cannot ambulate on his braces and crutches as theretofore. He has been further paralyzed. So two persons who at other times are clients of the Deposition Examiner, when he is in his capacity as attorney—these two persons, in attendance at the deposition, have thus successfully hindered the "constituted authority" from granting to the deponent-litigant the Equal Protection of the Laws. Partisans, wielding state power and clothed with it. Modern-day assassins, as effective as any gun invented. Liberty against these agents of government! Where is it to be found?

It is important to notice what the legislators said as they were to pass what is now 42 U.S.C.A. Sec. 1983 and 1985:

> "Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance. * * * Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not * * *. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. *Among the most dangerous things an injured party can do is to appeal to justice.*" Statement of Representative A. F. Perry of Ohio, Congressional Globe, 42d Congress, 1st Session, Appendix 78. (Emphasis added).

> "It is a monstrous assumption that this Government has not ample constitutional power to protect its own citizens because they happen to dwell inside the lines of a State that cannot *or will not* protect them * * *." Statement of Representative J. Packard of Indiana, Congressional Globe, 42d Congress, 1st Session, Appendix 281. (Emphasis added).

Is it to be said that not even four of the gentlemen of this Court would vote in good conscience to hear this petitioner's case? Are the Civil Rights Acts to be a dead letter? Unenforceable, particularly in the 7th Circuit?

A society that does not grant justice to the humble and to the weak, soon puts the seal of finality and condemnation upon itself. Apparently it is an idle declaration for this petitioner to declare "I am an American citizen." The Court of Appeals' decision contains an ominous threat to every witness—he cannot be protected. Depositions are thus to be the place where deponents, particularly the meek and the frail, can be tortured with impunity, and a wise citizen does well to arm himself before being compelled to go to such a place. And blind men can be knocked down

on the way to court. And the national courts cannot grant sanctions? Why? Because it is more expedient to wave away such a petitioner, to throw his unheard case in the wastebasket and not to grant him liberty against agents of government? Is it to be said that there are no Federal Constitutional limitations circumscribing the state compulsory deposition power?

The petitioner has made it his day-and-night undertaking, since the events of this case and another related case took place, to study in depth the law and the Constitution and the Civil Rights Acts, so that he might objectively argue his own case—hoping even to argue *pro se* before this Court the questions of misuse of state compulsory power and liberty against agents of government. But all, apparently, in vain.

This is a case, like *Ziang Sung Wan* v. *United States* (266 U.S. 1), involving the torture of an invalid, that gores the conscience and haunts the silent moment.

In petitioner's case, denial of certiorari is simply heartless and empty promise injustice ratified by way of a clipped word telegram of denial and an abrupt memorandum decision. The petitioner asks this Court to reconsider its denial of certiorari.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

SHERMAN H. SKOLNICK,
Petitioner Pro Se.

CERTIFICATE OF PETITIONER PRO SE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Sherman H. Skolnick,
Petitioner, *Pro Se.*